IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2419 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LOK ADHIKAR SANGH

Versus

STATE OF GUJARAT

Appearance:

MR GIRISH PATEL for Petitioners

MS NANDINI JOSHI ASST.GOVERNMENT PLEADER for Respondent No. 1

NOTICE SERVED for Respondent No. 2, 3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 14/06/2001

ORAL JUDGEMENT

This petition filed by Lok Adhikar Sangh, a non-Governmental organisation and petitioner No.2 Savitaben Champakbhai Vasava is for claiming compensation in the sum of Rs.50,000/- to petitioner No.2 (hereinafter

referred to as `the petitioner') towards mental and physical agony suffered by the said petitioner by the birth of a child and the expenses for his education and maintenance. The claim is made on the ground that the petitioner had undergone tubectomy operation on 30-12-1988 and that at the time of operation, the petitioner was informed that the operation was successful and she need not take any other birth control precautions. In spite of the said assurance, the petitioner conceived and delivered a child on 10-12-1989.

2. In response to the Rule, affidavit-in-reply is filed by Under Secretary to the State Government in the Health and Family Welfare Department stating that at the time of operation no guarantee is given about the success of the operation and, therefore, the failure of any such operation cannot be made the basis for asking any compensation. Reference is also made to the report contained in the booklet "Practice of Fertility Control" written by Shri S.K. Chaudhary wherein also it is stated that failure of such operation is in one out of four hundred. It is further contended that the petitioner could have availed of the services for medical termination of pregnancy and that the petitioner herself being responsible for such omission, no compensation can be claimed from the respondents.

3. In Bharuch District Panchayat & Ors. vs. Kanubhai Raijibhai Patel & Ors. reported in 1996 (1) GLH 584, the Division Bench of this Court had an occasion to consider a similar claim which arose from civil suits filed in the trial court. The suits were decreed on the ground that the operations were not successful on account of the negligence of the doctor. Allowing the appeals filed by the District Panchayats, this Court observed as under:

> 4. In these cases, the doctor himself has given evidence that there is a possibility of the operation failing in four to five cases out of 1000. The doctor who has been examined in the first case has stated that he has performed 10,000 operations; in this country of vast population and acute problem of over-population, these operations are performed in millions every year and there will be hundreds of cases where these operations fail in spite of having taken all care and having performed the operations properly, but that percentage is very small even though figures might be running in hundreds. The

> percentage might be less than 1%, hardly 0.1 to 0.4%, but it is certain that these 0.4% of the operations are likely to fail and it would not be possible to say that it is necessarily due to negligence of the doctor. In some extreme cases of medical negligence, the doctrine of res ipsa loquitur may apply, but in these kind of operations, where thousands are successful and only a small faction of a portion is failing, it cannot by any means be taken as a proof of negligence by the doctrine of res ipsa loquitur.

4. In view of the aforesaid principle laid down by the Division Bench, it is not possible to hold that the operation in question had failed on account of any medical negligence and that the doctrine of res ipsa loquitur could be invoked.

5. In view of the aforesaid principle laid down by this Court, this petition deserves to be dismissed. Accordingly, the same is dismissed with no order as to costs. Rule is discharged. No costs.

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zgs/-